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No. 83-1863

In the Supreme Court of the United States

OCTOBER TERM, 1984

BILLY L. LIGHTLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly applied the plain error standard in reviewing petitioner's claim that evidence of other crimes should not have been admitted into evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 728 F.2d 468.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 27, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on 44 counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of extortion, in violation of 18 U.S.C. 1951; and four counts of submitting false income tax

returns, in violation of 26 U.S.C. 7206(1) (Pet. App. 1a-2a). Petitioner was sentenced to five years' imprisonment on each mail fraud count, 12 years' imprisonment on each extortion count, and three years' imprisonment on each tax count, all sentences to run concurrently. In addition, he was fined $10,000 on one of the extortion counts.

1. Petitioner was one of three county commissioners for Kingfisher County, Oklahoma. The evidence at trial showed that from 1975 through early 1981 petitioner engaged in a scheme to defraud the citizens of the county of their right to a fair, open, and honest government by requesting and receiving kickbacks in connection with the purchase of construction materials and equipment and cleaning equipment and supplies (Tr. 250-273, 334, 418-419, 469, 497-501, 565, 645, 676-677, 683-684). Those who paid kickbacks to petitioner testified that the amount of the kickback — five to ten percent of the purchase price — was calculated either as part of the quoted price or as a reduction in the value of any equipment taken in trade (Tr. 253, 255-256, 331, 336-337, 405-406, 412, 416-417, 463-464, 494-496, 586, 642, 668-670). When the scheme was in full operation, a salesman or broker who received an order from petitioner completed the order and filed a claim or invoice. The claim was paid with a county warrant, which was sent through the mail. After the warrant was received, the salesman or broker personally paid petitioner a cash kickback. Tr. 335-336, 338-339, 405-406, 409, 470, 494-496, 587-588, 676-677, 704-706. Salesmen or brokers who did not pay kickbacks did not obtain business with the county (Tr. 334, 407, 470, 586, 668-670). Petitioner did not report the kickbacks he received as income on his tax returns (Tr. 609-612, 616, 617).

2. The court of appeals affirmed (Pet. App. 1a-5a). It rejected petitioner's claim that the district court committed reversible error in admitting testimony that George Walta

and Floyd Rudd, the two other commissioners for Kingfisher County, had accepted kickbacks and had pleaded guilty to charges related to receipt of kickbacks (*id.* at 4a-5a).[1] The court of appeals agreed that testimony that Walta and Rudd had received kickbacks, introduced during the government's case in chief, should not have been admitted, since Walta and Rudd were not defendants and no conspiracy was charged. The court noted, however, that petitioner had not objected to the questions at issue and had thereby deprived the trial court of the opportunity to exclude the testimony or to admonish the jury not to infer guilt on the part of petitioner from the acts of the other commissioners.[2] In light of the overwhelming testimony from government witnesses that they had paid kickbacks to petitioner, the court of appeals concluded that admission of the testimony regarding receipt of kickbacks by Walta and Rudd was not plain error. Pet. App. 5a.

The court of appeals concluded that the government's cross-examination of defense witnesses, which revealed in several instances that Walta and Rudd had pleaded guilty to taking kickbacks, was permissible impeachment of the witnesses. Each witness had testified on direct examination

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[1]The court of appeals also rejected petitioner's contentions that the evidence failed to show that the mailings of the county warrants were in furtherance of the scheme to defraud (Pet. App. 2a-3a); that the district court erroneously denied his motion to change venue because of pretrial publicity (*id.* at 3a); and that the district court abused its discretion in admitting evidence of certain other wrongs of petitioner, not included in the indictment, pursuant to Fed. R. Evid. 404(b) (Pet. App. 3a-4a). Petitioner does not challenge these holdings in this Court.

[2]In fact, the trial court sua sponte offered to give a cautionary instruction unless petitioner opposed it (Tr. 346). After petitioner registered no objection (Tr. 347), the trial court cautioned the jury that evidence of wrongdoing by the other commissioners should be considered only on the issue of the existence of a scheme and did not constitute evidence of petitioner's involvement in the scheme (Tr. 359).

that petitioner had never asked him for a kickback and that the witness had not paid any kickbacks to petitioner. On cross-examination, each witness testified that he had done business with Walta and Rudd, had never paid them kickbacks, but knew that they had resigned from office and had pleaded guilty to accepting kickbacks. The court of appeals concluded that the trial court did not abuse its discretion in permitting the government to rebut the favorable inferences petitioner had developed on direct examination. Pet. App. 5a.

ARGUMENT

Petitioner contends (Pet. 11-26) that the trial court erred in admitting testimony that Walta and Rudd, the two other county commissioners, had received kickbacks and had pleaded guilty in connection with receipt of those kickbacks. That contention is without merit. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. The primary thrust of petitioner's argument is that the court of appeals should not have applied the plain error standard, because, contrary to the court of appeals' belief (see Pet. App. 5a), petitioner did object at trial to introduction of the evidence concerning Walta and Rudd.[3] That fact-bound claim is not supported by the record.

Petitioner acknowledges (Pet. 12) that he made no objection at the time the prosecutor first elicited testimony from a government witness that kickbacks were paid to all three Kingfisher County commissioners (see Tr. 249). He attempts

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[3]We note that in his petition for rehearing petitioner did not contend that the court of appeals had overlooked the objections he now claims he made during the trial. See Pet. App. 1b-4b.

to excuse that failure by citing "obvious tactical considerations" (Pet. 12). In response to subsequent references to the kickbacks paid to the other commissioners, petitioner's counsel merely objected that the evidence was "incompetent, irrelevant, and immaterial," "[d]oesn't prove or disprove anything," or "has no bearing on this" (Tr. 259, 260, 262, 287, 325). At no time did petitioner's counsel ask the court for a limiting instruction in connection with the testimony about the other commissioners.

The trial judge on his own initiative noted that, although he believed evidence of kickbacks paid to the other commissioners was properly admitted to show the general scheme charged in the indictment, "it would be far more correct if I gave a cautionary instruction" concerning that evidence unless counsel opposed such an instruction (Tr. 346). Before the next recess the trial judge instructed the jury that the evidence concerning the other commissioners was admitted only on the issue of the existence of the scheme charged in the indictment and should not be considered evidence of petitioner's involvement in the scheme (Tr. 359). He reminded the jury of this instruction later in the trial, during the testimony of a defense witness (Tr. 1064). The trial judge repeated the instruction during his final charge to the jury (Tr. 1236).

During cross-examination, several of petitioner's witnesses testified that they had transacted business with all three county commissioners and had not paid kickbacks to any of them, but acknowledged that they were aware that Walta and Rudd had resigned and pleaded guilty to taking kickbacks (Tr. 792-797, 812-816, 987). Petitioner objected in general terms on two occasions, citing irrelevancy and the fact that Rudd was not on trial. See Pet. 19-20. In the case of one defense witness, petitioner's counsel failed to object when the prosecutor asked about the witness's knowledge of Walta's and Rudd's guilty pleas (Tr. 987, 991). After the

witness was excused, petitioner's counsel objected in general terms to questions about Walta and Rudd, but did not complain specifically about the reference to their guilty pleas (Tr. 991-992). The trial court then offered to give another cautionary instruction, but petitioner's counsel advised that he preferred not to call attention to the testimony and that he would "leave it go at this time" (Tr. 992-993).

Under Fed. R. Crim. P. 51 and Fed. R. Evid. 103(a)(1), a party is charged with objecting to alleged error at the time it occurs, with sufficient specificity so that the court knows the basis for the objection and the action the party requests. Failure to state an objection in a timely and specific manner amounts to waiver of the objection, and any alleged error not properly objected to will be addressed on appeal only if it constitutes plain error. Fed. R. Crim. P. 52(b); Fed. R. Evid. 103(a)(1) and (d). Moreover, "if a general objection is overruled when a specific objection should have been made, the party is precluded from asserting the proper objection on appeal." *United States* v. *Wilson*, 690 F.2d 1267, 1274 (9th Cir. 1982), cert. denied, No. 82-6591 (Oct. 3, 1983).

Here petitioner either did not object at all to the error he now alleges, or he objected in terms so general that the court could not have been expected to understand the basis for his objection. Although petitioner now complains that there was only one cautionary instruction (Pet. 20; but see page 5, *supra*), he himself never requested such an instruction during the trial. Indeed, petitioner declined the trial court's offer to renew a cautionary instruction after the cross-examination of defense witnesses elicited the fact that Walta and Rudd had pleaded guilty (Tr. 991-993). Thus, petitioner clearly waived his right to have his claims considered on appeal under a standard other than plain error.

2. Admission of the testimony concerning Walta and Rudd clearly did not amount to plain error, if indeed it was error at all.[4] The testimony of several government witnesses that they had paid kickbacks to Walta and Rudd was not introduced to suggest petitioner's guilt; rather, it served to explain generally the manner in which vendors paid kickbacks and to explain particular vouchers that showed the names of all three county commissioners. As the court of appeals recognized (Pet. App. 5a), the testimony of defense witnesses that they had never paid kickbacks to Walta and Rudd but were aware that those individuals had pleaded guilty to receipt of kickbacks served to rebut favorable inferences petitioner's counsel had developed through direct testimony that the witnesses had never paid kickbacks

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[4]In concluding that questioning of government witnesses about Walta and Rudd was improper, the court of appeals cited *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970), in which the court reversed convictions on the ground that evidence of other crimes should not have been introduced. Pet. App. 4a. We agree with the general proposition for which the court of appeals cited *DeCicco* — that the acts of one person cannot be used to imply the guilt of another who is not shown to be involved in the misconduct of the former. But *DeCicco* is clearly distinguishable from this case.

The testimony at issue in *DeCicco* was repeated by several witnesses, apparently at some length. Defense counsel objected on each occasion. See 435 F.2d at 481-482. In addition, in *DeCicco* the acts of which evidence was introduced had taken place prior to the scheme at issue in the trial. The government claimed that the evidence would help to establish intent of the defendants, but the court concluded that intent was not at issue under either the prosecution or defense theories of the case. In the court's view, the cautionary instructions given by the trial court were not sufficiently specific. The strength of the government's case in *DeCicco* was questionable, since the defense had mounted a "telling challenge" to the credibility of the government's principal witness. *Id.* at 483 n.6. Under these circumstances, the court concluded that the prejudice to the defendants outweighed the probative value of the evidence. As the discussion in the text indicates, the circumstances of this case are quite different from those in *DeCicco*.

to petitioner.[5] As the trial court noted (Tr. 991-992), the references to Walta and Rudd were brief. In addition, the government witnesses testified that they did not tell petitioner about their separate dealings with Walta and Rudd. See, *e.g.*, Tr. 263-264, 338-339. Thus, it is unlikely that the jury would have inferred petitioner's guilt from the testimony about actions of the other commissioners.

The trial court gave curative instructions during trial and in the final charge to the jury. See page 3 note 5, 5, *supra*. It offered to give additional curative instructions, but petitioner's counsel declined the offer, apparently for tactical reasons. The evidence of petitioner's guilt, in the form of testimony by numerous witnesses that they paid kickbacks to petitioner over a number of years, was overwhelming. See Pet. App. 5a. Thus, assuming admission of the testimony concerning Walta and Rudd was error, it appears to have been harmless. In these circumstances, admission of the testimony cannot be said to constitute plain error. See, *e.g.*, *United States* v. *Veal*, 703 F.2d 1224, 1228-1229 (11th Cir. 1983); *United States* v. *Mattoni*, 698 F.2d 691, 694-695 (5th Cir. 1983); *United States* v. *Brewer*, 630 F.2d 795, 801 (10th Cir. 1980); *United States* v. *Bass*, 562 F.2d 967, 969-970 & n.3 (5th Cir. 1977).

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[5]The fact that the cross-examination testimony was used for purposes of rebuttal appears to have been the basis for the court of appeals' conclusion (Pet. App. 5a) that admission of that testimony was not an abuse of discretion. In this Court petitioner does not specifically challenge the court of appeals' conclusion that the cross-examination constituted proper rebuttal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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